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Supreme Court of the United States

OCTOBER TERM, 1945

No. 35

ASBURY HOSPITAL, A CORPORATION,
APPELLANT

vs.

CASS COUNTY, NORTH DAKOTA, A PUBLIC CORPORATION, R. F. CROAL, AS STATE'S ATTORNEY OF CASS COUNTY, NORTH DAKOTA, ET, AL.,

APPELLEES

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

OPINIONS DELIVERED BY THE COURT BELOW.

Two opinions were delivered by the North Dakota Supreme Court; the first, upon an appeal from a demurrer (which is an intermediate order under North Dakota law) will be found reported as Asbury Hospital vs. Cass County, et al., 72 N.D. 359, 7 N.W. (2d) 438 (R. 29); upon appeal from the final judgment of the District Court of Cass County, the North Dakota Supreme Court delivered another opinion which will be found reported as Asbury Hospital vs. Cass County, et al., ___ N.D. ___, 16 N.W. (2d) 513 (R. 59).

JURISDICTION

A complete Jurisdictional Statement has heretofore been printed and filed, and this Court, on March 5th, 1945, noted probable jurisdiction and transferred the cause to the Summary Docket (R. 67).

Jurisdiction is based upon Section 237 (a) of the United States Code. Briefly, the Supreme Court of North Dakota, the highest court of that State, has held that a certain Initiative Measure adopted by the people of that State, on June 29th, 1932, entitled "An Act prohibiting corporation farming, and relating to corporations acquiring and holding real estate not necessary in the operation of their business", is a valid and subsisting statute of the State of North Dakota, notwithstanding the contentions of the appellant that such statute is repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the application of such statute to appellant and to its property deny it the equal protection of the law, deprive it of its property without due process of law contrary to the Fourteenth Amendment, and is violative of rights guaranteed to appellant by Section 10 of Article I of the Constitution of the United States.

The challenged legislation is found in the Laws of North Dakota of 1933, pp. 494, 495; it was amended by Chapter 89, Laws of North Dakota of 1933 and by Chapter 111, Laws of North Dakota 1935; as a result of recodification of statutes, the legislation is now found in Chapter 10-06 North Dakota Revised Code of 1943.

The Initiative Measure so challenged, reflecting the material changes accomplished by the amendments, reads as follows:

Section 1. "That all corporations, both domestic and foreign, except as otherwise provided in this Act, are hereby prohibited from engaging in the business of farming or agriculture." Section 1, Chap. 89, Laws 1933,

Section 2. "That all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable, for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years from the date that this Act takes effect, provided that during said ten year period said corporations may farm and use said real estate for agricultural purposes provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the land against any grantee, successor of (or) assignee of such corporation, which is also a corporation". Section 2, Chap. 89, Laws 1933.

Section 3. "That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired, provided that during said ten year period it may farm and use the same for agricultural purposes, provided further that the ten year limitation provided by this Section shall be deemed a covenant, running with the title to the

land against any grantee, successor of (or) assignee of such corporation, which is also a corporation." Section 3, Chap. 89, Laws 1933.

Section 4. "That the title and ownership of any real estate acquired, in any manner, by any domestic or foreign corporation, since the approval and adoption of the aforesaid initiated law, is hereby declared to be legal and valid for all purposes, notwithstanding any provisions in said initiated law contained, but subject however, to all of the provisions now contained in said initiated law as hereby amended and reenacted." Section 4, Chap. 89, Laws 1933.

Section 5. "That nothing in this Act shall be construed to prohibit co-operative corporations, seventy-five per cent of whose members or stockholders are actual farmers, residing in (on) farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in co-operative farming or agriculture."

Section 6. "That in case any corporation, either domestic or foreign, violates any provisions of this Act and fails within the time fixed by this Act to dispose of any real estate after it has acquired title to same, which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the State's Attorney of such county; and such county shall within one year dispose of same at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such procedure shall have been paid, shall be paid to the corporation that formerly owned the same."

(R. 32, 33, 34)

This action, commenced in December 1941, was brought to obtain an injunction against the enforcement of the law against appellant's property acquired by it before the legislation was passed, and also to secure a declaratory judgment under the provisions of the Uniform Declaratory Judgments Act of North Dakota (Chap. 237, Laws 1923, Supp. 1925, Sections 7712a1-a16), that such real property owned by appellant was not subject to the initiative measure (R. 1).

The District Court of Cass County, finding that the subject matter of the action was a proper one for a declaratory judgment, sustained a demurrer to the complaint (R. 15). On appeal the Supreme Court of North Dakota affirmed that holding (R. 29). Under North Dakota law, an order overruling or sustaining a demurrer is classified as an intermediate order (Section 7832 North Dakota Compiled Laws 1913); Devereaux v. Katz, 22 N.D. 351, 133 N.W. 553; Langer v. The Courier News, 48 N.D. 280, 183 N.W. 1009; Asbury Hospital v. Cass County, North Dakota, ___ N.D. ___, 16 N.W. (2d) 523. The Supreme Court of North Dakota, upon such appeal, did affirmatively find that the subject matter of the action was a proper one for the rendition of a declaratory judgment, and did declare the law but adversely to appellant's contentions (R. 29).

Upon remand to the District Court further proceedings were had, and the District Court made its findings of fact, conclusions of law, order for judgment and final judgment adversely to appellant (R. 16-20). An

appeal from this final judgment of the District Court of Cass County was taken to the Supreme Court of North Dakota, and it, on such appeal, rendered its decision and final judgment of affirmance (R. 21) (R. 59-63). An appeal to this Court was thereafter duly allowed (R. 63-64). The Supreme Court of the United States has jurisdiction to review a declaratory judgment such as is here involved. Nashville, Chattanooga, & St. Louis Ry. v. Wallace (1933) 288 U.S. 249. Under the circumstances, it is contended that this Court has jurisdiction.

STATEMENT OF THE CASE

Appellant brought this suit in the District Court of Cass County, North Dakota, in December 1941, under the Uniform Declaratory Judgments Act of North Dakota (Chap. 237, Laws 1923, Supp. 1925, Section 7712a1-16), to secure a judicial declaration that certain property owned by the appellant is not subject to the provisions of an initiated measure adopted June 29th, 1932, by the State of North Dakota entitled "An Act prohibiting corporation farming, and relating to corporations acquiring and holding real estate not necessary in the operation of their business." (R. 1-15). This Act is printed in full on pp. 3 and 4 of this brief.

Appellant alleged, and the Court below found to be true (R. 16), the following facts:

Appellant, Asbury Hospital, is a nonprofit corporation, with perpetual existence, organized under the laws of the State of Minnesota; it is a corporation of, and subject to the discipline of the Methodist Episcopal

Church, and is created and exists for religious and charitable purposes solely; under the laws of the State of Minnesota it has power to sue in any court, to acquire or purchase, or otherwise hold, enjoy, improve, lease, encumber and convey real and personal property (R. 1-2).

Prior to 1925 appellant became the owner of a real estate mortgage on 160 acres of land in Cass County, North Dakota; this mortgage and others came to it through the Will of Maria H. Williams; on November 27th, 1925, prior to the passage of said Initiative Measure, it became the owner of the real property covered by such mortgage, the same having been conveyed to it in liquidation and satisfaction of the indebtedness secured by the mortgage; appellant is still the owner in fee simple of such property (R. 2-3); the real property is farming land used and usable for farming; appellant is not engaged in the business of farming and agriculture, and since the date of the acquisition of such property, the same has been farmed by residents of North Dakota under various farm lease contracts on the usual forms which prevail in the community where the land is situated (R-3). When appellant acquired said mortgage, and when it acquired title and ownership of said real estate, appellant had the right, power and authority under its Articles of Incorporation and under the laws of the State of Minnesota, to be and become the owner of such mortgage and of such real property; and at the time and on the date that appellant became the owner of said mortgage and of said real estate, there existed in North Dakota no law or statute restricting or forbidding the plaintiff's ownership of said mortgage

or of said real estate, and that when said real estate was acquired by appellant, it had the right under the laws of North Dakota as they then existed, to be and become the full, unrestricted and unconditional owner of said mortgage and of said real estate; and to acquire a full, complete and indefeasible title in and to said property (R. 3).

While the record is silent on the question as to whether or not Asbury Hospital, as a Minnesota corporation, ever qualified as a foreign corporation in North Dakota under its statutes, it is a fact that Asbury Hospital did not qualify as a foreign corporation in that State. However, Asbury Hospital was not obligated by North Dakota statutes to qualify as a foreign corporation.

Section 5238, Supp. 1925 North Dakota, regulating the doing of business in North Dakota by foreign corporations, while providing that no foreign corporation shall transact any business within this state, or acquire, hold or dispose of property, real or personal, until certain conditions are complied with, does further provide:

> "The provisions of this Chapter shall not apply to corporations created for religious or charitable purposes solely, nor to the holding and disposing of such real estate as may be acquired only by foreclosure or otherwise in liquidation of mortgages or other securities by corporations which may not have complied with the provisions of this article."

This legislation was amended by Chapter 116, Laws of North Dakota 1937, known as the Foreign Corporation Act, prescribing conditions for obtaining certificates of authority by foreign corporations. That act provides,

however, that "corporation" shall mean a corporation formed for profit. Asbury Hospital was a religious, charitable, and nonprofit corporation (R. 1-2) and was therefore not either eligible nor required to qualify as a foreign corporation in North Dakota.

The defendants, appellees here, in this action, are Cass County, North Dakota; R. F. Croal, as States Attorney of said County, and Alvin C. Strutz, as Attorney General of the State of North Dakota, and their successors in office; the defendants threatened to enforce said legislation against the appellant's property, and unless restrained and enjoined from so doing, would commence action, to the end that the title to said property would escheat to the county immediately following July 29th, 1942, in accordance with the provisions of said initiative measure (R. 4).

Appellant, since 1930, constantly attempted to sell the real property in question but has been unable to sell the same for the amount of the mortgage originally on it, and any sale which appellant might make would be substantially below the amount of money plaintiff has invested therein, and any sale of the property that might be made by the county, pursuant to proceedings for an escheat under such initiative measure, would be for less than the amount of the mortgage, costs and expenses of said action, and a sale under the provisions of such law would result in further decreasing any amount that might be received upon the sale (R. 13).

Such real estate is not necessary for the conduct of appellant's business excepting in the following respects: Appellant is permitted by the laws of Minnesota to

make investment of funds not immediately required for its operations and the ownership of said mortgage, and the subsequent acquisition of title to the lands covered thereby represents a legal and lawful function and exercise of one of the powers of plaintiff as a corporation; the holding of such surplus funds in such investments is one of appellant's lawful functions and powers, and as such constitutes a part of the conduct of its business (R. 13).

Appellant contended in the court below that the application and enforcement of said initiated law as against the appellant and its real property acquired prior to the passage thereof, would be violative of rights guaranteed to appellant by Section 10, Article I of the Constitution of the United States prohibiting states from impairing the obligation of contract, and by Section 1, Article 14 of the Amendments thereto, in that the enforcement of such law against appellant's property acquired prior to the passage of said law, confiscated its property, impaired vested rights, took its property without due process of law, and denied appellant the equal protection of the law under the Fourteenth Amendment. (R. 11-12). An actual controversy existed between appellant and appellees as to the application of such legislative enactments (R. 36) (R. 38).

The record also shows that appellant owned approximately thirty other parcels of land in North Dakota (R. 5-6); that other religious and charitable organizations of various types also possessed land holdings of similar character (R. 6-11).

Judgment was asked of the court below that such initiative measure be adjudged and declared to be not applicable to farm lands acquired prior to July 29th, 1932, the effective date of such legislation; that if such legislation be held to be applicable, that it be declared unconstitutional and unenforcible, and that an appropriate judgment be entered to prevent defendants from instituting any action or proceeding under the terms thereof (R. 14-15).

Defendants entered a general demurrer to the complaint (R. 15). The District Court of Cass County, while holding that the action was one in which a declaratory judgment should be entered, nevertheless sustained the demurrer (R. 15-16). An appeal was taken to the Supreme Court of North Dakota, and that Court in Asbury Hospital vs. Cass County, et al, 72 N.D. 359, 7 N.W. (2d) 438 (R. 29) held that the action was properly brought for a declaratory judgment (R. 38) but declared the law contrary to appellant's contentions (R. 29-58). The case was remanded to the District Court for further proceedings (R. 58).

As heretofore pointed out, an order sustaining a demurrer is an intermediate order and not a final judgment. Asbury Hospital v. Cass County et al: ___ N.D. ___, 16 N.W. (2d) 513. On remand to the District Court further proceedings were had and the District Court made its findings of fact, conclusions of law, order for judgment and final judgment declaring the law adversely to appellant's contentions, and denying the injunction (R. 16-20). An appeal from this final judgment to the Supreme Court of North Dakota was

then taken, and on November 3rd, 1944, it rendered its final judgment of affirmance. (R. 21). The opinion upon this appeal is set forth in the Record (R. 59-63).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

I.

The Supreme Court of North Dakota erred in its decision and judgment in holding that the Initiative Measure entitled "An Act Prohibiting Corporation Farming and Relating to Corporations Acquiring and Holding Real Estate Not Necessary in the Operation of Their Business", (North Dakota Session Laws for 1933 at pp. 494 and 495, and as amended by Chapter 89 of the North Dakota Session Laws for 1933, and as further amended by Chapter 111 of the North Dakota Session Laws for 1935) is not repugnant to and does not operate to infringe upon or deny to the appellant the rights guaranteed to it by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Affirmatively stated: The enforcement of such statute against appellant's property acquired by it prior to the passage of the statute, is an unwarranted infringement of vested property rights; and because other corporations are permitted to hold real property free from the restrictions imposed by such statute, it discriminates against and denies appellant the equal protection of the laws.

II.

The Supreme Court of North Dakota erred in said final decision and judgment by holding that such Initiative Measure does not impair the obligation of contract

between such state and the appellant, within the meaning of Article I Section 10 of the Constitution of the United States.

Affirmatively stated: Where the state of North Dakota, without regulation or restriction, allowed and permitted appellant to acquire the property in question, and where its rights therein were fully vested, an implied contract arises which may not thereafter be divested and impaired by legislation infringing rights incident to ownership of real property.

SUMMARY OF THE ARGUMENT

I. As applied to appellant's property acquired before the passage of the Corporation Farm Land Act, the legislation is in contravention of the Fourteenth Amendment 16

1. The legislation compelling appellant to dispose of its land against its will upon penalty of escheat and the sale thereof at county or public auction infringes vested property rights 18

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2. The legislation deprives appellant of the use of its property during the period from the time of escheat to the date of public sale by the county 27

3. The ten-year period provided in the Act for the disposal of land was, under the conditions as they existed, so inadequate as to amount to confiscation 29

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4. The discriminatory features of the legislation deny appellant the equal protection of the law within the meaning of the Fourteenth Amendment 41

(a) Corporations which acquire farm land by purchase after 1932 are allowed to hold the same indefinitely 41

(b) Corporations especially organized to deal in farm lands may hold such lands indefinitely 42

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(c) Cooperative corporations may hold land indefinitely 46

(d) There is no valid basis for the discriminatory classification as between corporations, and such discrimination is contrary to the Fourteenth Amendment 47

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ARGUMENT

I.

AS APPLIED TO APPELLANT'S PROPERTY ACQUIRED BEFORE THE PASSAGE OF THE CORPORATION FARM LAND ACT, THE LEGISLATION IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

No issue exists as to the right of appellant to engage in the business of farming. The record shows that it is not so engaged.

No contention is made that the state of North Dakota does not possess the general power to regulate the acts of both domestic and foreign corporations; but we deny the power of the state in exercising that power of regulation and control, to impair or infringe vested rights in property.

No contention is made that the state may not limit the tenure of holding of real property by corporations; but we deny that such unlimited right exists as to properties acquired before such control is made effective by legislation.

The property of corporations may be taken or its use controlled in only three ways:

(a) By exercise of the power of eminent domain; (b) by a valid exercise of the police power; and (c) under the reserved control which the state has over corporations generally.

In the instant case there is and can be no claim that under this legislation there is any taking of property for a public use, or any taking under the power of eminent

domain; neither is there any question of police power involved, because the several decisions of the North Dakota Supreme Court make it plain that the validity of the law in the instant case is not based upon the exercise of the state's police power. The sole and only ground upon which the North Dakota Supreme Court based its conclusions is upon the assertion that since the state possesses a regulatory control over the affairs of corporations, both domestic and foreign, that in the exercise of such regulatory control it may lawfully enact such a statute as this, and make it constitutionally applicable to all holdings of real estate, whether acquired before the act was passed or afterwards.

We may concede for the purpose of this part of the argument, that as to all lands acquired after July 29th, 1932, the prohibition against holding the same for more than ten years, is valid. The vital question is as to whether or not the prohibition against such holding beyond the ten year period can be constitutionally applied to lands acquired before the act was ever passed, and in the manner prescribed by the Act.

The material parts of this legislation which are pertinent to this action, provide in substance as follows:

(a) Corporations are required to sell farm lands acquired before 1932, within ten years after the date the act became effective;

(b) Corporations are permitted to farm the lands in the meantime;

(c) If the lands be not disposed of, the county is required to bring an action for the escheat of the title,

and the court must enter a judgment of escheat transferring the title to the lands in question to the county;

(d) The county shall sell the land within one year at public auction, and the proceeds of the sale, less the expenses, shall be paid over to the corporate owner;

(e) A corporation may retain lands which are necessary to the conduct of its business, and the act is not applicable to cooperative corporations if 75% of the members are farmers, or principally dependent upon farming for their livelihood.

When appellant acquired the lands involved in this case, no such regulations or restrictions existed. It acquired a fee simple title through liquidation of the mortgage which it owned thereon. It was within the state, with the permission of the state; it made its investment at a time when the law permitted it, if it acquired title, to obtain, have, and hold a full, complete and unconditional title.

1. The legislation compelling appellant to dispose of its land against its will upon penalty of escheat and a sale thereof by the county at public auction, infringes vested property rights.

The legislation in question prohibits appellant from continuing the ownership of the land, no matter when acquired. When Asbury Hospital became the owner of this land in 1927, it, under the well settled principles of the common law, acquired more than a bare legal title. The right of property is a broad, comprehensive right which goes far beyond the mere possession of legal title.

As stated by Mr. Justice Day, in Buchanan v. Warley, 245 U.S. 60;

> "The 14th Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U.S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. Cooley's Bl. Com. 127."

Another statement of the rule is that of the Court in Spann v. Dallas, 111 Tex. 350, 235 S.W. 513:

> "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result prescribes its ownership."

Neither should it matter that the whole property is not taken from the corporation by the terms of the Act. Confiscation, within the meaning of the Constitution, does not necessarily mean the taking of all the property. The taking of some property rights, or the serious injury thereto, is still confiscation.

The property right, of which Asbury Hospital is deprived by this legislation, is the right to determine when, to whom, upon what terms, and for what price it is willing to sell its property.

The right of security in the ownership of property is one of the fundamental precepts of our democratic civilization, long antedating the Federal and State constitutions. As Mr. Justice Pitney has said, in Ochoa v. Hernandez Y. Morales, 230 U.S. 139, 161:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

While, to some extent, the Supreme Court of North Dakota recognized these principles, that Court avoids the effect of these principles by reasoning as follows:

(a) It asserts that a foreign corporation is within the State as a matter of privilege, and a domestic corporation is constantly subject to regulation by the acts of the legislature.

(b) Because this is a perpetual reserved right, any property rights acquired by any corporation are taken

subject to the contingency that any right or privilege may be withdrawn, or its powers of regulation may be extended.

(c) The court then concludes that title to real estate acquired by corporations is a defeasible title, which might be divested, regulated, or controlled, and since title was taken subject to this contingency, the corporation has no constitutional complaint.

We contend that this logic and reasoning is contrary to the decisions of the Supreme Court of the United States. The same contention was made in the cases of Western Union Telegraph Company v. Kansas, 216 U.S. 1. In that case Mr. Justice White said:

> "It is shown that the telegraph company, many years ago, went into the state of Kansas, constructed its lines, established its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the state forbidding the company from doing as it did. From this it results that the corporation went into the state, constructed its plant, and carried on its business, on the implied invitation, or, at least, with the tacit consent, of the state. . . .The reasoning by which it is thus sought to sustain the right of the state to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The state, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such con-

ditions to the privilege of coming in as the state chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the state to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States, and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory, but is voluntarily assented to by the corporation, and hence may not be by it questioned. But even if, for the sake of the argument only, the general correctness of the proposition be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation. . . . . .

Nor, I submit, is there force in the suggestion that, under the facts here disclosed, the company cannot be heard to complain, because, as it was in the state without express authority, it must be assumed to have gone into the state and made its investment subject to the exertion by the state of its authority. I concede the proposition to be sound in so far as it includes the right of the state to exert its lawful powers. That is to say, I concede that the corporation, in going in and investing its property within the state, did so subject to the rights of the state to exert, as to the property thus in the state, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption."

And in the case of Chicago, Milwaukee, & St. Paul Railroad Company v. Wisconsin, 238 U.S. 491, Judge Lamar said:

"In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to altar the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed

to State ex rel. Northern P.R. Co. v. Railroad Commission, 140 Wis. 157, 121 N.W. 919, and the Water Power Cases, 148 Wis. 124, 38 LRA (NS) 526, 134 N.W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in Shields v. Ohio, 95 U.S. 324, 24 L. Ed. 359, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable. . . .and be consistent with the scope and object of the act of incorporation.' . . .Again, in Stearns v. Minnesota, 179 U.S. 223, 259, 45 L.Ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by . . . taking of property without due process of law.' Lake Shore & M.S.R. Co. v. Smith, 173 U.S. 690, 43 L. Ed. 861, 19 Sup. Ct. Rep. 565; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U.S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; Sinking Fund Cases, 99 U.S. 720, 25 L. Ed. 501; Miller v. New York, 15 Wall. 498, 21 L. Ed. 104; see also Delaware, L. & W.R. Co. v. Public Utilities, 85 N.J. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials. This conclusion makes it unnecessary to discuss the assignments relating to interstate commerce."

This court in a long line of decisions has settled the principle, that while the authority of a state under the

socalled reserved power over corporations is wide, it is not unlimited, and neither vested property rights nor the obligation of contracts may be destroyed or impaired.

The following decisions, we submit, support this proposition:

Phillips v. Jenkins, 297 U.S. 629
Coombes v. Getz, 285 U.S. 434
Sears v. Akron, 246 U.S. 242
Fair Haven & Westville Rd. Co. v. New Haven, 203 U.S. 379
Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403
Adirondack Railway Co. v. New York, 176 U.S. 335
Lake Shore Ry. Co. v. Smith, 173 U.S. 684
Greenwood v. Union Freight R.R. Co., 105 U.S. 13
Union Pacific R.R. Co. v. United States, 99 U.S. 700
The Boston Beer Co. v. Massachusetts, 97 U.S. 25

As stated by the Court in the case of State v. Neff, 52 Ohio St. 375, 40 N.E. 720:

"Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it the legislature can strip a corporation of its rights of property. 'The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases.' Shields v. Ohio, 95 U.S. 324.

In the case of Gilman v. Tucker, 128 N. Y. 190, 28 N.E. 1040, the Court said:

> "It cannot be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law, whatever may be the pretext upon which it is founded. It was said by Justice Jewett, in Embury v. Conner, 3 N.Y. 511, after a review of the authorities: 'I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation be made'."

The constitutional protection of vested rights extends to foreign corporations which have been permitted to acquire property within the State.

In the case of Mulford Co. v. Curry, 163 Calif. 276, 125 Pac. 236, that Court said:

> "The limitations upon the power of the state to forbid a corporation from doing a domestic business within its borders, or to regulate the conduct of that business, may be thus summarized: 'A corporation, unless expressly forbidden so to do, may acquire rights of contract and property in a foreign jurisdiction. A State, however, may exclude absolutely a foreign corporation not engaged in interstate commerce, but which proposed solely to engage in domestic business, from doing such business within its limits, and so may, of course, impose terms and conditions upon which alone such business may be commenced within its

limits, provided no unconstitutional condition is made a part of any actual agreement. S.P. Co. v. Denton, 146 U.S. 202, 13 Sup. Ct. 44, 36 L.Ed. 942. When a foreign corporation has once engaged in domestic business within the state, the state may not exercise its powers of exclusion or regulation to the destruction of the property of the corporation or of its vested constitutional rights."

To the extent that this legislation compels appellant to sell its property, and deprives it of the right to determine when, and for what price, and to whom it may desire to sell, this legislation infringes its property rights. This, we submit, cannot be done under the socalled reserved power of the state over corporations. It is under this socalled reserved power that the North Dakota Supreme Court based its decision, and upon that alone. In this, we submit, it erred.

2. The legislation deprives appellant of the use of its property during the period from the time of escheat to the date of public sale by the county.

It is to be observed from Section 6 of the Act, (page 4 hereof), that after a judgment of escheat is entered in an action brought for that purpose, the county is given one year to sell the land at public auction to the highest bidder. It is clear that after a judgment of escheat is entered, the corporate title is divested and title is vested in the county. The rights of the corporation in the land are at an end. The county is not obligated to make an immediate sale, nor are there any provisions in the Act for the disposition of growing crops. During that one year period a crop may be planted and harvested.

There are no provisions in the Act as to what disposition should be made of the rents and profits. The argument may be made that the corporation has no complaint if it receives the value of the escheated property. We point out that the receipt by the corporation of the value of the escheated property as determined at a public sale, still does not compensate the corporation because under the law, it has been deprived of the value of the use and occupation of the land during the one year period, or such time as may run before a public sale is had. The argument that a corporation cannot complain if it receives the value of the land as determined by public sale, is, we submit, without merit. A public sale provided for by the statute does not necessarily mean that the corporation will receive the true value of the property. The law prescribes that it shall be sold to the highest bidder. That bid may or may not be consistent with value. Furthermore, we point out that the public auction prescribed by the law to be held by the county, is one which is unregulated and uncontrolled; there is no provision for appraisal, or for judicial review, or any right to vacate the sale in case of an inadequate bid. Certainly it is obvious that when the court has entered its judgment of escheat, its power and jurisdiction are at an end, and there is nothing in the Act which would give the court the right to control the sale or to vacate it for the protection of the former corporate owner.

The North Dakota Supreme Court suggests that upon the authority of Greenwood v. Union Freight R.R. Co. 105 U.S. 13, the court has some power with

respect to the disposition of the property. But in the Greenwood Case the court was referring to a situation where the legislature made no law or direction with respect to the disposition of the property of a corporation where its charter was repealed. In the instant case the legislation did provide a specific mandatory direction; it provided upon escheat that title should pass to the county, and the county should sell the property at public auction. The Act did not prescribe that the court should sell it, or supervise or control its sale.

We submit that where the law takes away title, possession, and use of the property, and substitutes for it such money as some third party may be able to obtain for it upon a public uncontrolled and unregulated sale, this does not amount to compensation to the owner, and that it does amount to a taking of property contrary to the Fourteenth Amendment. Judicial sales generally provide for appraisal, supervision, and confirmation by a court, with the clear power on the part of the court to vacate sales where the price bid is inadequate. Certainly this Act does not provide for a judicial sale, and the corporate owner is subject to whatever circumstances may exist, and powerless to protect its interest in the land.

3. The ten year period provided in the Act for the disposal of land was, under the conditions as they existed, so inadequate as to amount to confiscation.

In the case of Abie State Bank v. Bryan, 282 U.S. 765, this court established the principle that a regulation, although valid when made, may become by reason of later events arbitrary and confiscatory in operation. In

the instant case the statute adopted in 1932 gave corporations a ten year period to dispose of their lands, but as will be demonstrated, the economic situation during that ten year period was such that corporations were unable to do so.

That courts will take judicial notice of economic data is now an established principle of constitutional law. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555. This statute allowing a ten year period may superficially appear to be reasonable. But "in passing on constitutional questions the Court has regard to substance and not to mere matters of form, and * * * in accordance with familiar principles the statute must be tested by its operation and effect".[1]

In the words of Mr. Justice Harlan:

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority".[2]

It is a demonstrable fact that during the period from July 1932, corporations have not been able to dispose of their lands. It has been economically impossible for them to do so.

North Dakota farmers have not been prevented from acquiring land, even at ridiculously low figures during the last decade.

We learn from a report of the Works Progress Administration that there are potential county lands

[1]Hughes, C. J., in Near v. Minnesota, 283 U.S. 697, 708.
[2]Mugler v. Kansas, 123 U.S. 623, 661.

(with five or more years' taxes delinquent) in the amount of 7,333,678 acres.[3] That there are already county tax deeds for 2,106,103 acres and that the lands owned by the Bank of North Dakota and the Board of University and Schools bring the total amount of such lands up to 13,258,021 acres. This huge reservoir of good land could be acquired by the farmers of North Dakota at very low prices.

The statistics hereafter set out as to the hardships under which the farmers labored during this period show quite clearly that the corporate ownership of land had nothing to do with these hardships, but rather that the hardships forced the foreclosures which resulted in some corporate ownership of land.

There is no suggestion that the appellant is holding its land for high prices. In fact, just the opposite is true. If Asbury Hospital is allowed to dispose of its land in the normal way, these lands will find their way back into the hands of North Dakota farmers just as fast as they are able to purchase them. Any forced sale at confiscatory prices would only result in the lands being accumulated by a few individual speculators who had the cash to buy them.

It is of the utmost importance that this Court recognize at the outset that this statute is not directed against property used for immoral or anti-social purposes which could justify confiscation under the so-called "police power" of the state, nor does it purport to condemn property for public purposes under any principle of

[3] O.P. No. 665-73-3-65 entitled "Publicly Owned Lands and Related Factors —North Dakota", dated December 23, 1940.

eminent domain. The statute is not aimed against farm lands held for speculative purposes nor lands allowed to be infested with weeds or grasshoppers. The reason for confiscation is not the use to which lands are put, but the corporate ownership thereof.

Asbury Hospital, because it chose to carry on its charitable work as a corporation, does not waive the protection of the Federal constitution. Corporations are creatures of the law and are not evil per se. They have always been granted the same protection under the law as individuals. It is difficult to understand how anyone can suppose that Maria H. Williams could legally own the farms in question and devote the proceeds therefrom to care for the sick in Asbury Hospital, and yet it be illegal for Asbury Hospital to take those farms at her death and devote the proceeds therefrom to care of the same persons. They are the ones who will suffer in any event. Asbury Hospital as a corporation should enjoy the same protection for its property under the Federal constitution as does an individual.

There has been no market for these lands. There have been no purchasers. There will be no purchasers at any reasonable price if the lands are escheated and sold in accordance with the terms of the statute. For all practical purposes, this is confiscation.

We start out with the situation which prompted passage of the statute: a certain amount of real estate was acquired by religious, charitable, educational or business corporations by reason of foreclosure of mortgages given to secure borrowings by farmers. The statute directed these corporations to dispose of this

real estate within ten years. But in order to sell there must be a market. There was no market.

In 1927, the number of farms changing ownership through voluntary sales and trades was 28.3 farms per thousand for the United States as a whole, and 23.9 farms per thousand for the State of North Dakota.* In 1931, the United States figure had declined to 19 farms per thousand; in North Dakota it had declined to 17.9. In 15 States a lower figure prevailed. In 1932, the figure for North Dakota declined to 12.4 farms per thousand as against 16.2 for the United States as a whole. In only 5 states was the figure lower. In 1933, compared with a figure of 16.8 farms per thousand voluntarily sold or traded throughout the United States, the figure for North Dakota had declined to 10.7 with only 2 states having a lower figure. Thereafter in 1934 and 1935, possibly due to the passage of the law in question, the comparative ranking of North Dakota rose, only to drop again. In 1934, 7 states showed a lower percentage of voluntary sales and trades. In 1935, only 5 states were lower. In 1936 only 2 states (South Dakota and Utah) were lower, and in 1937, 1938 and 1939 North Dakota had the smallest percentage of farms voluntarily

*United States Department of Agriculture Circular No. 261 (Jan. 1933) "The Farm Real Estate Situation 1931-1932", p. 37. Figures are for the year ending March 15, 1927.

sold and traded of any state in the Union.[5] In 1940 conditions had improved and North Dakota ranked ahead of 6 other states.[6] But by this time the ten year period was approaching an end.

What was the underlying reason for this situation?

In view of the existence of the law under consideration, and the obvious desire of corporations under any set of circumstances to dispose of real estate involuntarily acquired, it is quite apparent that the paucity of voluntary sales and trades in North Dakota was entirely due to a lack of purchasers. Farmers, particularly active farmers, are the largest group of farm land buyers.

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[5]Data obtained from United States Department of Agriculture Circular No. 354 (April, 1935) "The Farm Real Estate Situation 1933-1934", page 30; United States Department of Agriculture Circular No. 548 (October, 1939) "The Farm Real Estate Situation 1936-1937, 1937-1938, and 1938-1939", page 32.

Year	North Dakota	United States Average
1931	17.9	19.
1932	12.4	16.2
1933	10.7	16.8.
1934	13.7	17.8
1935	14.	19.4
1936	14.6	24.8
1937	13.8	31.5
1938	14	30.5 (as revised)
1939	14.4	29.6 (as revised)

Figures are for yearly periods ending March 15.

[6]Preliminary Report, United States Department of Agriculture, March, 1941. The figure is 20.9 for North Dakota; U.S. Average 29.8.

accounting for over three-fourths of the total.[1] This potential group of purchasers had simply ceased to exist in North Dakota during the period 1930 to 1940, due to economic conditions. No farmer had any money with which he could finance the purchase of a farm despite the fact that the value per acre of North Dakota farm land declined drastically during this ten year period. In 1933, a year after the law was passed, there were 12 states in which the value of farm lands had shrunk to a degree greater than the shrinkage in North Dakota. This same situation existed in 1934, but in 1935 and 1936 only 7 states were reported as having a greater depreciation. In 1937 North Dakota was sixth from the bottom, in 1938, fourth from the bottom, in 1939 only Missouri, South Dakota and Montana had lower comparative values than North Dakota, in

[1] According to United States Department of Agriculture Circular No. 548, "The Farm Real Estate Situation, 1936-1937, 1937-1938, and 1938-1939," page 37, over four-fifths of farms voluntarily bought are bought by local residents, over three-fifths of the buyers are active farmers, and about three-fourths of the buyers purchase for the purpose of operation. Although no specific figures are available for North Dakota it appears (page 38) that in the west north central group of states over four-fifths of the voluntary sales and trades of farm real estate during the period 1930 to 1940, inclusive, represented purchases by local residents. In 1939, 88% of voluntary purchases were made by local residents in this area, 71% being by active farmers. In this same bulletin, referring to the year 1937, it is said (Page 36): "Active farmers continue as the largest group of farm land buyers, accounting for somewhat over three-fifths of the total". According to the March, 1941, preliminary report of the United States Department of Agriculture "for the United States as a whole, active farmers continue as the most important group of buyers of farm land, accounting for approximately 68% of the total".

1940 only the state of South Dakota could rank as worse off than her sister state to the north.[8]

In 1930, the total value of farm land and buildings in the state of North Dakota was $951,000,000. In 1940 this had shrunk to $490,000,000.[9] Nor was there any influx of farmers into the state to take advantage of these depreciated values. The farm population of North Dakota declined from 397,294 in 1930 to 327,871

[8]Statistics for years prior to 1940 are taken from United States Department of Agriculture Circular No. 548, page 4, and for 1940 and 1941 from United States Department of Agriculture "Agricultural Finance Review, Vol. 4, No. 1, May, 1941", page 79. The 1941 figures are preliminary. The index numbers of estimated value per acre are based upon the 1912-1914 values which are arbitrarily given an index number of 100 as representing normal value. Comparative figures for North Dakota and the United States as a whole are as follows:

Year	North Dakota	United States
1913	100	100
1920	145	170
1930	95	115
1931	85	106
1932	75	89
1933	66	73
1934	68	76
1935	67	79
1936	68	82
1937	67	85
1938	64	85
1939	61	84
1940	57	85
1941 (prelim.)	56	86

[9]United States Department of Agriculture, "Agricultural Statistics, 1941", page 534. In 1920 the value was $1,489,000,000. During the period 1930-1940, although the number of farms in North Dakota had decreased from 77, 975 to 73,962, the total amount of land in farms had not appreciably decreased. In 1930 38,658,000 acres were under cultivation and in 1940 this had been reduced to 37,936,000 acres.

in 1940.[10] With an impoverished farm population and no immigration, but rather an exodus from the state, it is not difficult to understand why there was no market for farm lands. We refrain from quoting figures to demonstrate other facts well known to this Court militating against the possibility of an active market in North Dakota farmlands, namely, the existence of drouth conditions, of grasshoppers, of poor crops and of poor prices for farm products. Corporate farming was not responsible for these conditions, distressing as they were. But it was these conditions, among others, that prevented corporations from disposing of their farm lands.

In addition to the foregoing, a vast amount of acreage in the state has been forfeited for non-payment of taxes, thereby glutting the market with a superabundance of farms available for purchase at bankrupt prices. In 1932, 22 out of every 1000 farms in the state of North Dakota were forfeited by reason of delinquent taxes, as compared with an average of 13.4 for the United States as a whole. In 1933, the figure for North Dakota was 29.6 farms per thousand forfeited for this reason. After a short temporary decline during the period 1934 to 1938 during which the legislature of North Dakota strove by various statutory enactments to check the trend of forfeitures and afford the farmers an opportunity to retain their farms, the figure again rose in 1939 to 14.9 forfeited farms per thousand, and in 1940 to 16.3 farms per thousand. During the years 1939 and 1940 North

[10] United States Department of Agriculture, "Agricultural Statistics, 1941", page 548. The farm population in 1920 was 394,500.

Dakota had by far the highest percentage of farms forfeited for delinquent taxes of any state in the United States. The state next to North Dakota in this respect in 1939 was Montana, with 12.4 farms per thousand so forfeited; the third state in line was South Dakota, reporting 9.3 farms so forfeited. In 1940 North Dakota's figure was only approached by that of South Dakota (12.8 farms per thousand forfeited for taxes); the third state being Montana, with 10.6 of its farms so lost to the owner.[11]

The cash farm income of North Dakota was $150,160,000 in 1930. In 1932 it declined to $55,280,000 and it was not until 1936 that it again rose above the figure of $100,000,000. It did not again reach the 1930 level until 1940, when the reported income was $156,647,000.[12] Obviously there is no market for farms under these conditions.

Further statistics might be cited were it necessary to do so. It has been a decade of depression and great hardship for the farm population of North Dakota. We repeat, however, that these conditions were not caused by so-called corporation farming; in fact, it is probable that a goodly portion of the taxes paid to the state during this period were paid by the corporations which the Anti-Corporation Farming Law seeks to victimize. The Anti-Corporation Farming Law will not cure the farm depression, nor was it designed to do so. It demanded

[11]Data obtained from United States Department of Agriculture, Circulars Nos. 354, page 30, No. 548, page 32, and March 1941 Preliminary Report. The average throughout the United States in the years 1939 and 1940 was, respectively, 3.7 and 2.5 farms per thousand.

[12]United States Department of Agriculture Estimates.

that property be sold where no market existed, with a penalty of escheat in the event the impossible was not accomplished. As such, it is a confiscatory measure and should be condemned unhesitatingly as in violation of the Constitution of the United States.

The distressed condition of agriculture and the depressed prices of products and land were recognized during the period in question by both the State and National Government. Among other things, the Federal Government provided the following things for the relief of distressed farmers during the ten year period:

(a) Enlargement of the activities of the Federal Land Bank to provide funds for the saving of homes and reacquisition of foreclosed property;

(b) Creation of the Farm Administration;

(c) The creation of the Regional Agricultural Credit Corporations;

(d) The AAA program providing subsidies for farmers, including conservation and parity payments, and loans on grain for more than the market price;

(e) Federal Crop Insurance Program insuring against crop failures due to any cause;

(f) Passage and renewal from time to time of the Frazier-Lemke Bankruptcy Act.

The State of North Dakota, recognizing the period of emergency during this period, passed a general state moratorium law. (Chap. 242, Laws 1935). It was continued in force until July 1, 1943. (Ch. 190, Laws 1941).

The Supreme Court of North Dakota recognized in the case of Hunt v. Holmes, 64 N.D. 389, 252 N.W. 376, that a depression existed; it said:

> "It is a matter of common knowledge that because of the worldwide depression the property would be worth a great deal more on November 6, 1930, than it was in May 1932."

It was in June 1932 that this legislation was passed.

The State Legislature, in Chap. 157, Laws 1933, stated:

> "A public emergency and crisis exists. . . . . in that agricultural crops and products have been sold below the cost of production. . . ."

The State Legislature, in Chap. 161, Laws 1937, stated:

> "In view of the severe financial and economic distress prevailing throughout the State and Nation, and the extreme drought of the past two or three years, the legislature of the State of North Dakota hereby declares that a public economic emergency exists in the State of North Dakota."

The State Legislature, in Chap. 242, Laws 1935, expressly recognized "the distress of the farmers, the laborers, the businessmen, the tenants and the property owners, due to the extremely low prices of the products of the farm." Thus it appears that corporations were commanded to sell their lands at and during a time when no market existed therefore. This, we submit, is confiscation.

4. The discriminatory features of the legislation deny appellant the equal protection of the law within the meaning of the Fourteenth Amendment.

(a) Corporations which acquire land by purchase after July 1932, are not affected by the law at all, and may continue to hold such land without limitation or restriction indefinitely. This is obvious from a reading of the Act.

Section 2 of the Act (page 3 hereof) requires corporations which owned land when the Act was passed to sell within ten years. Section 3 of the Act requires corporations which acquired land by judicial process or operation of law to sell within ten years. It is only those corporations which acquired land after 1932 by judicial process or operation of law which must sell within the ten year period. Obviously, a corporation which purchased land by deed or grant after 1932 may hold it without limitation or restriction. This Act therefore, imposes the limitation of ten year ownership only upon corporations who happened to own land acquired before 1932, and upon corporations who acquired land thereafter "by judicial process or by operation of law". Corporations of all other classes are free to acquire land, and free to hold it without regard to the provisions of the Act in question.

Asbury Hospital is affected by the law because its land was acquired before 1932. If it acquired any land by mortgage foreclosure after 1932, such lands would also be affected. However, other corporations who desire to deal in lands and to buy, acquire, and hold the same after 1932, could do so with impunity and

without restraint. The Act therefore imposes its prohibitions against corporations whose title was acquired prior to a certain date, and against corporations whose manner of acquisition was "by judicial process or by operation of law." This, we contend, is not classification but is discrimination.

(b) Corporations especially organized to deal in farm lands may hold such lands indefinitely.

It was asserted by Asbury Hospital in the court below, that its land representing investment of surplus and endowment funds, was reasonably necessary for the conduct of the business of the corporation because the business of investment of its surplus funds was a power and function of the corporation itself. This contention was rejected by the Supreme Court of North Dakota. However, independently of that particular contention, it is clear that under this exception, corporations primarily formed for the purpose of acquiring, holding and dealing in land, may freely do so without limitation or restraint because such corporations fall squarely within the exception written into the statute. This makes it clear that corporate ownership as such is not one of the objects which prompted the enactment of this law.

Under similar statutes it has been uniformly held that corporations formed especially for the purpose of buying, selling, holding and dealing in lands fall within the exception of the Act.

> Sylvester Watts Smyth Realty Co. v. American Surety Co. of N.Y. 292 Mo. 423, 238 S.W. 494; Cree v. Associates Co., 192 Ky 669, 234 S.W. 288.

Ronaldson & Puckett Co. Ltd. v. Bynum, 122 La. 687, 48 So. 152;

A corporation may therefore, in North Dakota, buy, sell, deal in land and hold land for unlimited periods if it is organized especially for that purpose.

This view has been sustained by the lower courts of North Dakota.

In the case of Baldwin Corporation v. Dickey County, North Dakota, (District Court Dickey County), Judge Wm. H. Hutchinson rendered a written opinion. Omitting the preliminary statement, the pertinent facts and holding of the court are as follows:

> "The parties to this action upon oral argument were agreed that the controversy in this case was one properly determinable under the Declaratory Judgments Act. This question seems to have been settled by our own Supreme Court in the case of Asbury Hospital Corp. v. Cass County, et al., which case has been very recently decided.
>
> Do the provisions of the so-called Anti-Corporation Farming Act adopted in June, 1932, and amended in 1933 and in 1935 apply and thus involve the farm lands owned by the plaintiff, appears to be the question for the Court's decision. It will not be necessary for the Court in this memorandum to set forth the provisions in full of the so-called Anti-Corporation Farming Act. The Act does provide 'that all corporations, both domestic and foreign, who now own or hold rural real estate, used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same within ten years . . .'' For the decision

in this case, the facts properly pleaded must be considered as true. Those facts are that the plaintiff is a foreign corporation authorized to do business in the State of North Dakota. The corporation was organized for the purpose of engaging in the real-estate business, which would include the buying and selling of farm lands and the farming of lands owned by the plaintiff. The plaintiff has been engaged in the real estate business in North Dakota since November, 1917, and it now owns about eighty quarter-sections of farm land in Dickey County which is usable for farming purposes, and all was acquired before June, 1932. The plaintiff has never actively engaged in the farming of its lands but has always leased the lands to tenants. All of the plaintiff's lands involved are reasonably necessary for the conduct of plaintiff's business.

It is conceded that it has been heretofore lawful for a corporation organized for that purpose to engage in the real estate business, including the buying and selling of farm lands and the renting and operating of said farm lands while owned by the corporation. Did the people of the State of North Dakota when they adopted the so-called Anti-Corporation Farming Act intend to forbid all corporations from engaging in the farm real estate business? Or was it, rather, the intention of the people to prohibit corporations, both domestic and foreign, who were engaged in some other principal business, from holding farm property for a longer period than provided in said act? Had the people intended to make it unlawful for any corporation to engage in any farm real estate business, why was the following exception placed

in the law, to-wit: 'except such as is reasonably necessary in the conduct of their business'? Had the people in the initiated measure, or the Legislature, desired to make it unlawful for any corporation, either foreign or domestic, to engage in the business of owning or operating farm property or to engage in the business of buying or selling farm property, it could have been clearly expressed in the law. If such a law had been enacted, it undoubtedly would have been constitutional and upheld by the courts.

There is no question but that the lands involved in this action are necessary in the conduct of plaintiff's business. If the plaintiff is to continue in the business of buying and selling farm lands it will be necessary to have said lands farmed while owned by the corporation. It appears to the Court, therefore, that the lands here involved fall within the exception as expressed in the so-called Anti-Corporation Farming Act. To hold otherwise would by implication extend the actual provisions of the Act. It is not the purpose of the courts to legislate. See the following cases:

Ronaldson & Puckett Co., Ltd. v. Bynum, 48 So. 152;

Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York, 238 S.W. 494;

Cree v. Associates Co., 234 S.W. 288.

The Court will, therefore, sign an order overruling the defendants' demurrer, with leave to the defendantants to serve and file an answer within twenty days.

Dated at Wahpeton, North Dakota, this 16th day of September, 1942.

BY THE COURT:

Wm. H. Hutchinson, Judge."

The Baldwin case thereafter proceeded to final judgment in favor of the plaintiff and the Attorney General did not appeal.

A similar result was reached in the case of Northwestern Improvement Company v. Morton County (District Court Morton County, North Dakota), Hon. H. L. Berry, Judge, which proceeded to final judgment in favor of the corporation for an injunction, and in which case the Attorney General took no appeal.

Hence, it is to be observed that if the object of the law is to prohibit corporate ownership, such result is not accomplished but rather that there is no valid classification and there is discrimination in fact.

(c) Section 5 of the Act (page 4 hereof) permits cooperative corporations, 75% of whose members are stockholders, are actual farmers residing on farms or depending principally on farming for their livelihood to acquire and hold real estate without limitation. It is not necessary that the members or stockholders be actual farmers residing on farms. Real estate speculators who may use the cooperative form of incorporation, and who confine their activities to income from farm lands, may successfully operate under this law without regulation of any kind.

Upon consideration of the foregoing propositions we respectfully contend that the law does not provide for

a valid classification but results in unconstitutional discrimination within the meaning of the Fourteenth Amendment.

The Supreme Court of North Dakota held, on the authority of Blake vs. McClung, 172 U.S. 239, that appellant was not "within the jurisdiction". The fact is, however, that Asbury Hospital, a Minnesota corporation, was effectively within the State because it owned thirty or more parcels of land within the State of North Dakota, (R. 5). Its property was there, and it is that property against which this Act was directed. As a foreign corporation it was not eligible to qualify as such and did not need to do so under North Dakota statutes. (See this Brief, page 8).

The rule in Blake v. McClung, supra, was distinctly qualified by this court in Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U.S. 544. In that case this court held that a corporation is a person within the meaning of the due process and equal protection clauses of the Fourteenth Amendment, and that where a foreign corporation goes into a state to recover possession of property taken from it within that state, it is "within the jurisdiction" within the meaning of that amendment.

Certainly, in the instant case, Asbury Hospital possessing real property within this jurisdiction, should be held to be within the State so as to be entitled to claim the benefits of constitutional safeguards as affecting such property.

(d) There is, we submit, no valid basis for the discriminatory classification as between corporations as

heretofore pointed out. Corporate ownership by some corporations is condemned, and without valid reason, corporate ownership by others is permitted. This discrimination, we contend, is invalid and contrary to the Fourteenth Amendment upon the authority of Connolly v. Union Sewer Pipe Company, 184 U.S. 540. In that case the Court said:

> "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis, ... But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this . . . . No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary 'selection'."

Arbitrary discrimination denies the equal protection of the laws.

Brown v. Jacobs Pharmacy Co. 115 Ga. 429, 41 S.E. 553
State v. Cudahy Packing Co. 33 Mont. 179, 82 Pac. 833
Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N.E. 927
Weco Products Co. v. Reed Drug Co. — Wis. —, 274 N.W. 426
Cotting v. Kansas City Stockyards Co., 183 U.S. 79
Southern Ry. Co. v. Green, 216 U.S. 400
Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N.W. 776
Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150
Power Mfg. Co. v. Saunders, 274 U.S. 490
Quaker City Cab Co. vs. Pennsylvania, 277 U.S. 389

II.

THE LEGISLATION IMPAIRS THE OBLIGATION OF CONTRACT WITHIN THE MEANING OF ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES.

The lower court found that Asbury Hospital in 1927 had the right to and was permitted by the State of North Dakota to acquire the real estate in question without limitation or restriction of any kind. It was permitted to acquire a fee simple title which was absolute and unconditional. (R. 2-3). When the real estate was acquired there existed in North Dakota no law or statute restricting or forbidding appellant's ownership of the real estate (R. 3).

Asbury Hospital was a nonprofit corporation and was created and existed for religious and charitable purposes solely (R. 1-2). As a foreign corporation it was neither eligible nor required to qualify as such by North Dakota statutes (See page 8 of this brief).

Appellant therefore acquired this property free from restriction, with the full consent and permission of the State of North Dakota. It obtained a vested right in the property with the consent of the State. As heretofore pointed out in this brief, this right of property included the right on the part of appellant to sell and dispose of it when and upon such terms as appellant might elect. These circumstances, we submit, implied a contract which may not be impaired by subsequent legislation in view of Article 10, Section 1 of the Constitution of the United States.

That an implied contract may exist under similar circumstances is recognized in the following decisions:

Seaboard Air Line Ry. Co. v. Railroad Commission (C.C. Ala.) 155 Fed. 792, 802

Herndon v. Chicago Rock Island Pac. Ry. Co. 218 U.S. 135

St. Louis & S.F. R. Co. v. Cross, Sec'y. (C.C. W.D. Okla.), 171 Fed. 480

Western Union Tel. Co. v. Kansas, 216 U.S. 1

The Supreme Court of North Dakota denied appellant's contention. We urge that it erred in refusing to hold that there was an implied contract between the state and the corporation when it allowed Asbury Hospital, with its permission, to acquire this property, that it would not take or confiscate that property.

CONCLUSION

The North Dakota Supreme Court rested its decision in large part upon the decision of this court in the case of Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129. That case, we submit, does not sustain the decision of the court below for the following reasons:

1. There was in that case no taking away or confiscation of the tangible property of the corporation; the statute in question merely enjoined the corporation from using the property as a cotton gin.

2. The Act was sustained as a valid exercise of the police power.

In the instant case, there is no question of police power. The court below did not mention the subject. Obviously there is no basis of fact or law for the exercise of the police power under the circumstances, because an analysis of the statute indicates clearly that corporate ownership as such is not legislated against, but only certain classes of corporate ownership are singled out for regulation.

In the case of State vs. Klein, 63 N.D. 514, 525, the exercise of the police power was urged as a reason for sustaining the statute in question which enlarged the period of redemption after foreclosure of a mortgage. In that case Judge Burr pointed out that in North Dakota under the peculiar provisions of its constitution, the State may not, even under its police power, take property without due process of law. (See Article I, Declaration of Rights, Constitution of North Dakota, Section 24). For that obvious reason, that Court did

not attempt to base its decision upon any assertion that it was a police power measure.

The judgment appealed from should be reversed.

Respectfully submitted,

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